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No. 95-1611

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS INCORPORATED, BROWN & WILLIAMSON TOBACCO CORPORATION, LIGGETT GROUP, INC., LORILLARD TOBACCO COMPANY, THE COUNCIL FOR TOBACCO RESEARCH – U.S.A., INC., AND THE TOBACCO INSTITUTE, INC.,

Petitioners,

v.

THE STATE OF MINNESOTA, BY HUBERT H. HUMPHREY, III, ITS ATTORNEY GENERAL, AND BLUE CROSS AND BLUE SHIELD OF MINNESOTA,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota And The Court Of Appeals Of Minnesota

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the state trial court's pre-trial discovery Order under Minnesota Rule of Civil Procedure 26.02(c) that, upon Respondents' showing of substantial need and undue hardship, Petitioners produce ordinary work product – but not work product revealing any opinions, theories or strategies of counsel – violate Petitioners' due process rights or constitute an unconstitutional "taking of property"?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The State of Minnesota and Blue Cross and Blue Shield of Minnesota are Respondents to the Writ. AWARE Integrated, Inc. is the non-profit parent holding company of Blue Cross and Blue Shield of Minnesota. Blue Cross and Blue Shield of Minnesota has no subsidiaries that are not wholly-owned.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents State of Minnesota and Blue Cross and Blue Shield of Minnesota respectfully request that this Court deny the Petition for a Writ of Certiorari. The Petition seeks review of the Minnesota Supreme Court's refusal to grant discretionary review of the Minnesota Court of Appeals' refusal to grant a writ of prohibition against the trial court's pre-trial discovery order.

JURISDICTION

To create jurisdiction under 28 U.S.C. section 1257, an asserted federal question must be "substantial," that is not merely "formal" and not so "absolutely devoid of merit as to be frivolous." *Equitable Life Assur. Soc'y v. Brown*, 187 U.S. 308, 311 (1902). Respondents submit that Petitioners' arguments that routine discovery under the Minnesota Rules of Civil Procedure is unconstitutional fail to satisfy this jurisdictional threshold.

STATEMENT OF THE CASE

Petitioners seek review, using fanciful constitutional arguments as purported "federal questions," of a pre-trial discovery order issued by a Minnesota state trial court pursuant to Minnesota Rule of Civil Procedure 26.02(c). In their attempt to transform a discretionary discovery order into an issue of constitutional magnitude, Petitioners necessarily fail to disclose to this Court the generous amounts of "process" they were afforded by the

Minnesota courts and the fact- and case-specific nature of the decisions of which they complain. The trial court judge entertained several rounds of briefing and conducted extensive *ex parte in camera* review of the materials before ordering that some be produced and some be redacted. The Court of Appeals reviewed the materials before upholding the trial court's Order. In addition, Petitioners ignore well-recognized principles that plainly allow the discovery of ordinary work product upon a factual showing of substantial need and undue hardship.

This action against the cigarette industry arises out of a decades-long conspiracy of intentional wrongdoing by the leading cigarette manufacturers and their trade associations. The State of Minnesota and Blue Cross and Blue Shield of Minnesota seek to recover the substantial sums of money each spends for health care for smoking-attributable death and disease.

This case involves a massive amount of document discovery. Petitioners have represented that they will produce at least 9 million pages of documents. Petitioners' Appendix ("P.A.") 16a. The trial court estimated that "[i]f five attorneys were to devote twelve hours each per day, five days per week, to the task of reviewing those nine million pages – and limit their review to one minute per page – it would take nine years to review those documents alone." *Id.* Recognizing the need to streamline this discovery, the trial court entered the November 1, 1995 Order at issue in the Petition.

The November 1 Order was issued only after ten months of repeated rounds of briefing and oral argument and, in fact, was the culmination of four previous Orders

on the issue. In addition, the November 1 Order was entered only after extensive *in camera* review of random samples of the indices. Thus, Petitioners' possible attempt to preserve a due process claim by suggesting that there was a lack of process is a mischaracterization of the proceedings below. Petition ("Pet."), p. 4. *See* Supreme Court Rule 15.2.[1]

The first Order on indices was issued on March 29, 1995, as one provision in an extensive Case Management Order that required all parties, including Respondents, to produce existing indices of documents relative to smoking and health. Respondents' Appendix ("R.A.") 13, 30. One defendant, B.A.T. Industries, p.l.c., complied. Petitioners, however, refused to produce their indices, and on July 17, 1995, the trial court issued a second Order allowing each Petitioner to submit, for *in camera* review on an *ex parte* basis, any index for which it claimed any privilege or work-product protection. R.A. 24. Petitioners did not comply with this Order, arguing instead that they were entitled to an extraordinary *in camera, ex parte* hearing on the issue. P.A. 6a. The trial court then issued a third Order, mandating the production of all existing indices to the Court for *in camera* review within five days. R.A. 32. Still, Petitioners resisted, moving instead for a modification of that Order allowing them to submit only sample indices for *in camera* review. The trial court's

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[1] Petitioners also misstate the record when they claim that "respondents sought to obtain all of the petitioners' databases in their entirety . . . " Pet., p. 4. Respondents specifically requested that the court redact any "opinion" work product, such as attorney comments or analyses.

fourth Order ordered *in camera* production of "random and representative" samples of the indices. R.A. 35. Finally, on August 17 and August 28, 1995, Petitioners submitted samples of their indices for *in camera* review.

After reviewing the sample indices, the trial court issued the Order which is the subject of the present Petition. P.A. 4a-18a. Based upon its review, the court specifically found that "the parties can produce indices of objective information on the millions of documents in their databases without revealing attorney opinion, mental impressions, strategies or theories." P.A. 18a.

The trial court carefully segregated those portions of the indices containing "opinion work product," from the indices' "objective information." P.A. 6a-12a. Only the latter was found to be discoverable. In meticulous detail, the court described the objective fields of information to be produced to plaintiffs. *Id.* Only the most basic, identifying information was ordered produced, for example document numbers, document dates, document authors, document recipients, verbatim titles and document types. This information, when it is produced to Respondents, will be subject to a protective order that allows sharing of confidential information with counsel in other cases only upon agreement by the parties or further court order.

Any "subject matter" information or even identification of documents by topic was ordered redacted. Indeed, the Order required that "inferred" titles of documents – as opposed to "verbatim" titles – be redacted. P.A. 9a. Respondent State of Minnesota was ordered to produce

its index after redacting an "attorney comments" field. P.A. 6a.[2]

The trial court's order was based upon extensive factual findings. Only after reviewing the information did the court segregate discoverable from non-discoverable information. The trial court also relied on its factual findings to conclude that Respondents had made the "proper showing" required under the Minnesota Rules to obtain the objective information from the indices. P.A. 15a. The court calculated the burden caused by Petitioners' massive anticipated document production, the burden posed by requiring Respondents to create new and separate identifying information, and whether there was an equivalent substitute for the objective content of the indices. The result of this factual inquiry was the trial court's conclusion, described in the very language of Minnesota Rule of Civil Procedure 26.02(c), that "the required showing of substantial need and inability to obtain the equivalent without undue hardship has been met." P.A. 16a. Because Petitioners had, even before the Order was issued, made it clear they would appeal any unfavorable ruling, the trial court stayed production of the indices until the Petitioners had "exhausted their available appellate remedies." P.A. 12a.

Petitioners then sought from the Minnesota Court of Appeals the extraordinary remedy of a writ of prohibition. The Petitioners submitted the sample indices at issue to the Court of Appeals, again in an *ex parte* fashion.

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[2] Respondent Blue Cross and Blue Shield of Minnesota did not have any existing index. P.A. 5a.

The Court of Appeals denied the writ, deferring to "the specific findings made by the district court" after reviewing "the documents submitted for in camera review." P.A. 3a. Petitioners then sought discretionary review in the Minnesota Supreme Court of the Court of Appeals' denial of the writ of prohibition. The Minnesota Supreme Court denied review without comment.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Petition Seeks Review of the Factual Findings Made By A State Court Under A State Procedural Rule

The decisions of the Minnesota courts are simply the application of the well-settled work product doctrine, as embodied in the Minnesota Rules, to the facts of this case.[3] The scope of work-product protection was litigated in the Minnesota state courts, whose conclusions were that the indices, after redaction of information revealing attorney theories, opinions or strategies, were discoverable under Minnesota Rule of Civil Procedure 26.02(c), which authorizes the disclosure of ordinary work product upon a showing of "substantial need" and "undue hardship." Thus, Petitioners' real complaint is with the trial court's case-specific application of the Minnesota rule of procedure. *See* Pet., p. 9 ("The obvious error of the decision below is its interpretation of the 'substantial need' requirement under the work product doctrine."). The trial

[3] Minnesota Rule of Civil Procedure 26.02(c) is identical in all relevant aspects to Federal Rule of Civil Procedure 26(b)(3).

court's application of Minnesota Rule of Civil Procedure 26.02 is, however, an issue of state law – adequate and independent of any federal question – for which this Court lacks jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1037-38 (1983). Moreover, a petition for a writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Petitioners concede that the Rule which the trial court applied is constitutionally valid. Pet., p. 19 n.6.

Petitioners can cite no case holding that court-ordered discovery under the state or federal rules of civil procedure of information allegedly protected by the work product doctrine raises any constitutional concern. One reason for this lack of authority is, no doubt, that taken to its logical end, Petitioners' position would end pre-trial discovery as it is now practiced.

This paucity of authority establishes that there is no "compelling reason" for review. Supreme Court Rule 10. The Petitioners have failed to identify any conflict, much less a well-developed conflict, among the state and lower federal courts that could merit this Court's review. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (prudential concerns suggest that this Court should first let states "serve as laboratories" even with respect to important issues). This dearth of decisions on the issues shows a lack of substantiality. This Court "does not sit to satisfy a scholarly interest" in issues that raise only an intellectually interesting or academic problem, or that are only "episodic" in nature. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). This hesitancy to review issues that have not played out fully in the lower courts is

especially important "where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Id.*

The lack of attention paid by the state and lower federal courts to the theories asserted by Petitioners is explained by the substantive weakness of their arguments. The necessary premise to either of Petitioners' constitutional arguments is that even the limited, objective information that the court found discoverable is, under *every* circumstance, absolutely protected from discovery by the work product doctrine. Even if the information is only sometimes discoverable, then Petitioners have the "fair warning" required by due process. *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). Also, Petitioners could then harbor no reasonable "investment-backed expectation" that the information would not be discoverable, as required before there can be a "taking" under the Fifth Amendment. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

Petitioners thus overstate repeatedly that "those databases are clearly protected from disclosure" (Petitioners' "Question Presented"), that the order of discovery was "contrary to the work product rules as universally recognized by the state and federal courts" (Pet., p. 7), that the databases are "clearly protected . . . by the work product doctrine" (Pet., p. 8), that work product protection "clearly applies" (Pet., p. 11), and that by failing to recognize as much the state courts committed a "wholesale rewriting of the rules of procedure in the middle of a major lawsuit . . . " (Pet., p. 12). These pleas for absolute immunity from discovery, the

only potential basis of a constitutional claim, are repudiated by the work product doctrine, its careful fact-specific application in this case and a long history of cases allowing discovery of similar information.

This Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), the origin of the work product doctrine, explicitly noted the limited nature of work product protection:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases.

Id. at 511.[4] Such an exception serves discovery's purpose that trials "no longer need be carried on in the dark." *Id.* at 501.

The limited nature of work product protection established in *Hickman* is embodied in the state rule of procedure at issue in this case. Minnesota Rule of Civil Procedure 26.02(c) mirrors its federal counterpart in that it allows discovery of work product in some circumstances:

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party

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[4] Petitioners' repetitive description of their databases as "non-evidentiary" is without legal significance. Pet., pp. 3, 13, 18. *Hickman* establishes that work product need not be admissible in order to be discoverable. The category of information described by the Court includes that which might "give clues as to the existence or location of relevant facts." *Hickman*, 329 U.S. at 511.

> or by or for that other party's representative (including the other party's attorney, . . .) only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Minn. R. Civ. P. 26.02(c) (1995).

Petitioners' claim of surprise that objective information from their databases could be discoverable under the work product rules is unconvincing. Courts have historically found that the type of information ordered produced in this case is discoverable. Early cases addressing "attorney databases" put Petitioners on "fair warning" that at least portions of any work product database may be discoverable. For example, in *United States v. American Tel. and Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980), the court considered the discoverability of "documents pertaining to a 'database' consisting of computerized abstracts of documents" which was prepared by or for the parties' attorneys specifically in anticipation of litigation. *Id.* at 1289, 1298. After describing how the "qualified privilege" of work product could be overridden by a showing of substantial need, the court remanded to consider whether the requesting party could meet the "substantial need" standard. *Id.* at 1302. Similarly, in *United States v. International Business Machines Corp.*, 58 F.R.D. 556, 558-59 (S.D.N.Y. 1973), the court found that "a computerized 'database' created by CDC's lawyers" which was designed to assist counsel in the organization of numerous documents involved in a complex case, if it

had not been destroyed, could have been discoverable under the work product doctrine.

This trend by courts to recognize that at least redacted versions of litigation databases are discoverable continues to the present. *Scovish v. Upjohn Co.*, 1995 Con. Super. LEXIS 328 (Conn. Super. Nov. 22, 1995) (ordering discovery of redacted "document retrieval system" prepared by opposing party's counsel for a nationwide litigation), *appeal dismissed*, (March 20, 1996).

Once the redactions ordered by the state trial court in this case are taken into account, the information ordered to be produced is merely objective, identifying information for documents relevant to smoking and health cases. The Minnesota courts were on solid legal ground in rejecting Petitioners' claim that the mere selection by attorneys of the millions of documents included on these indices would reveal the attorneys' "opinion work product." P.A. 17a.

The heightened protection of opinion work product is not triggered "unless disclosure creates a real, non-speculative danger of revealing the lawyer's thoughts." *In re San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1015 (1st Cir. 1988). Thus, other courts have routinely found that there is no opinion work product protection for lists or indices of large sets of documents selected by attorneys. *In re Shell Oil Refinery*, 125 F.R.D. 132, 134 (E.D. La. 1989) (ordering lists of documents selected by plaintiffs for copying discoverable because "it is highly unlikely that Shell will be able to discern the [plaintiffs'] 'theory of the case' . . . simply by knowing

which 65,000 documents . . . have been selected for copying"); *Washington Bancorporation v. Said*, 145 F.R.D. 274, 278 (D.D.C. 1992) (requiring that document indices compiled by counsel be produced because "the extreme number of documents indexed here virtually eliminates the possibility that defendants could glean from this index . . . litigation strategy"); *see also Matter of Grand Jury Subpoenas*, 959 F.2d 1158, 1167 (2d Cir. 1992) (large volume of records deserves no opinion work product protection because records were "sufficiently voluminous to minimize disclosure of the attorneys' identification of some occasional wheat among the chaff"). The information ordered produced in this case is "ordinary" work product that is discoverable upon a showing of need.[5]

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[5] In the courts below, Petitioners relied upon cases finding that an attorney's selection of a few significant documents may reveal opinions or theories. *See Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.) (counsel selected "a few documents out of thousands"), *cert. denied*, 474 U.S. 903 (1985). The courts below rejected these cases as inapplicable in this case, where the selection is of millions of documents. P.A. 17a.

The only case that Petitioners have pointed to as holding that computerized data bases are "opinion work product" which cannot be discoverable is *In re I.B.M. Peripheral EDP Devices Antitrust Litigation*, 5 Comp. Law. Serv. Rptr. 878 (N.D. Cal. 1975), an obscure decision which cites no authority for its ruling. Even in *I.B.M. Peripherals*, the court left open the issue of whether the objective portions of the data bases were discoverable if they could be segregated from the summaries and analysis of I.B.M. counsel.

2. Petitioners' Fanciful Constitutional Arguments Do Not Merit Review

A. There Is No Substantive Due Process Issue.

Petitioners contend that the trial court's factual assessment pursuant to the guidelines of Minn. R. Civ. P. 26.02 somehow represented a "wholesale rewriting of the rules of procedure in the middle of a major lawsuit." Pet., p. 12. The hyperbole is obvious: Minnesota Rule of Civil Procedure 26.02 underwent no change because of the court's ruling. Indeed, as shown above, the weight of the authority reveals that the state court simply and correctly applied the facts before it to the statutory framework. Petitioners lost no "well-established common law protection" because the court faithfully applied well-settled law, protecting their "opinion work product" while ordering the objective information produced in response to plaintiffs' showing of need.[6]

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[6] Petitioners challenge the state trial court's factual assessment of substantial need by arguing that the court could find such need only if the information at issue was otherwise unavailable. Pet., pp. 9-10. This Court does not, however, grant *certiorari* to review fact issues. *United States v. Johnston*, 268 U.S. 220, 227 (1925); Supreme Court Rule 10. In any event, Petitioners' narrow redefinition of "substantial need" is legally incorrect. The test involves "a balance between the importance of the material sought and the time, expense and effort required to obtain their substantial equivalent by other means." Edward Sherman & Stephen Kinnard, "The Development, Discovery and Use of Computer Support Systems in Achieving Efficiency in Litigation," 79 *Colum. L. Rev.* 267, 276 (1979). Where parties "flood their discovering opponent with documents," it may be desirable to find that the "substantial equivalent" requirement is met. *Id.* at 278.

Thus there is no retroactivity issue. *See* Pet., pp. 11-12. The presumption against retroactivity functions to avoid the unfairness of "imposing new burdens on persons after the fact." *Landgraf v. U.S.I. Film Products*, 114 S. Ct. 1483, 1500 (1994). With respect to court decisions, retroactivity becomes an issue only if a construction "unexpectedly broadens a statute which on its face had been definite and precise." *Bouie*, 378 U.S. at 353 (finding that decision which rejected 95 years of consistent holdings and was clearly at variance with the statutory language deprived criminal defendants of due process). In such circumstances, there is a "deprivation of the right of fair warning." *Id.* at 352. Here, Petitioners had "fair warning" from *Hickman*, the language of the Minnesota Rule which the trial court faithfully applied, and earlier case law holding that similar information was subject to discovery. There is no good-faith argument that the trial court's decision represented a retroactive rewriting of the rules of procedure.[7]

Indeed, the fact that other courts have applied similar work product rules, such as those found in the Federal Rules of Civil Procedure, to reach similar results shows the fairness of the decisions below. *See, e.g., Scovish, In re Shell Oil Refinery* and *Washington Bancorporation, supra.* This "widely shared practice" is a "concrete indicator" of

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[7] Even if the Petitioners' allegations were correct, there would be no due process concerns. Changes in procedural rules are often applied in suits arising before their enactment without raising concerns about retroactivity. *Landsgraf*, 114 S. Ct. at 1502 (there are "diminished reliance interests in matters of procedure").

the fundamental fairness that due process requires. *Schad v. Arizona*, 501 U.S. 624, 640-43 (1991).

Due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence. *Burnham v. Superior Court of California*, 495 U.S. 604, 609 (1990). Petitioners enjoyed those proceedings in abundance in this case. Only after several rounds of briefing and extensive *ex parte in camera* review of the indices did the trial court order that some be produced and some be redacted. The judgment resulting from these "fair procedures" is entitled to a strong presumption of validity. Indeed, "there are persuasive reasons for suggesting that the presumption should be irrebuttable, or virtually so." *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993) (citation omitted).

It is not surprising that the due process decisions on which Petitioners rely have nothing to do with the pretrial exchange of information under rules of civil discovery. *See Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331 (1994) (amendment prohibiting judicial review of amount of punitive damages violates due process); *Burnham v. Superior Court of California*, 495 U.S. 604 (1990) (exercise of personal jurisdiction based on defendant's presence in state comports with due process); *Brown v. Mississippi*, 297 U.S. 278 (1936) (convictions based on confessions extracted by torture violate due process); *Tumey v. State of Ohio*, 273 U.S. 510 (1927) (conviction by a court with financial interest in gaining conviction is a violation of due process). Issues of discovery are dedicated to the discretion of the trial court. *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987). Here, the Minnesota courts

exercised their discretion in accordance with their settled procedural rule: after *ex parte in camera* review, the trial judge properly separated opinion work product from ordinary work product and correctly determined that Respondents had shown substantial need for the latter. As long as discretion is exercised within such reasonable constraints, due process is well satisfied. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991).

B. There Is No "Takings" Issue

Petitioners can point to no case invalidating a discovery procedure, or requiring compensation, on the grounds that the pre-trial exchange of information is somehow a "taking" under the Fifth Amendment.[8] The lack of case law establishing that discovery is a "taking"

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[3] Petitioners claim that some courts "have suggested" that "in some circumstances" court-ordered pretrial discovery can be a "taking." Pet., p. 15 n.4. None of those cases cited by Petitioners are relevant here. Indeed, *St. Jude Medical, Inc. v. Intermedics, Inc.*, 107 F.R.D. 398, 400-01 (D. Minn. 1985), rejected the argument that the disclosure of trade secrets in pre-trial discovery constituted an unconstitutional taking of property. *Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 464 (D. Utah 1991), merely opined without any legal support that disclosure might constitute a taking when nonparties are given access to "personal histories and medical records" of a party. Petitioners also cite cases concerning only the issue of whether compelling a *nonparty* expert to testify would violate Federal Rule of Civil Procedure 45(c)(3)(B), *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.*, 148 F.R.D. 552, 557 & n.11 (S.D.W.Va. 1993), or whether ordering production of an expert's computer program materials would violate Federal Rule of Civil Procedure 26(b)(4)(B), *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122, 1136, 1138 (S.D. Tex. 1976).

demonstrates that the theory lacks both the substantiality needed to justify review by this Court and substantive merit.

Indeed, *Ruckelshaus v. Monsanto Company*, 467 U.S. 986 (1984), the case upon which Petitioners rely repeatedly, demonstrates that there is no credible constitutional argument. *Monsanto* requires more than the Petitioners' showing that their indices were costly to develop and have been kept confidential from others. Pet., p. 13. Indeed, Petitioners have not even met the *Monsanto* definition of property, having failed to show "from an independent source such as state law" that the objective information from their data bases is "property." By contrast, in *Monsanto*, the defendant showed that the information at issue was a trade secret under Missouri law. *Monsanto*, 467 U.S. at 1002-04. Importantly, it was only to the extent that Monsanto's information was classified as a trade secret under Missouri law that the information was protected by the Fifth Amendment. *Id.*

Even if Petitioners could make a showing of "property," there would be no issue under the Takings Clause. This Court has identified factors to be taken into account when determining whether a governmental action effects a taking. Among those are "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224-25 (1986); *Monsanto*, 467 U.S. at 1005. These factors show the frivolity of Petitioners' "taking" claims.

First, there is no physical invasion or permanent appropriation of the Petitioners' objective information.

Connolly, 475 U.S. at 225. And it cannot be said that "the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Id.* at 223. Here, the court simply ordered that limited information be provided, subject to a protective order, to respondents for the purposes of pretrial discovery. Where interference with a property right arises from "a public program" – like the court system – in order to "promote the common good," that interference is rarely a taking. *Id.* at 225. Here, the use of the information will, in the words of *Hickman*, ensure that "civil trials . . . no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman*, 329 U.S. at 502.

Second, Petitioners cannot claim an economic impact. All subjective information, such as legal analysis, is redacted under the court's Order and will not be produced. The objective information from Petitioners' databases is not a salable asset, such as the "trade secrets" in *Monsanto*. *See* Gregory Gelfand, " 'Taking' Informational Property Through Discovery," 66 *Wash. U. L.Q.* 703, 709 (1988) ("the key to the taking argument . . . lies in a comparison of the use for which the owner of the property would normally be compensated and the use for which it is being taken by forced disclosure"). The incompatibility of Petitioners' argument with a true "takings" analysis is shown by Petitioners' awkward attempt to extend *Monsanto*'s concern that trade secrets not be transferred to business competitors. *Monsanto*, 467 U.S. at 1012 (voicing concern over loss of "competitive advantage"). Petitioners claim protection against their "competitors in

litigation," a concept unknown to Takings Clause jurisprudence, and in conflict with the fundamental underpinnings of the rules of civil procedure. Pet., p. 17.

Finally, Petitioners must show an investment-backed expectation that the objective information from their databases would not be discoverable. *Monsanto*, 467 U.S. at 1005-06. As this Court established in *Monsanto*, no such expectation could be reasonable where, at the time of submission, legal authority existed to allow submitted data to be disclosed to others. *Id.* at 1006-07 (Monsanto "can hardly argue that its reasonable investment-backed expectations are disturbed when E.P.A. acts to use or disclose data in a manner that was authorized by law at the time of submission"). Likewise, no such expectation can exist where it was well-known that in practice, the information could be disclosed. *Id.* at 1009-10 (there can be no expectation where E.P.A. made it a practice of disseminating disclosed data).

Given the long-honored rule that work product information may be subject to discovery and, indeed, the numerous cases requiring that information very similar to that at issue here be produced, any expectation that the information was immune from discovery was unreasonable. Petitioners may have had a "unilateral expectation or an abstract need" that the objective information from their data bases would not be discoverable. That, however, is insufficient to turn the production of that information into a "taking." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

CONCLUSION

The Petition should be denied. Petitioners seek review of a correct discretionary state court discovery ruling made under a state rule of civil procedure. The constitutional issues Petitioners raise as purported federal questions are not substantial or sufficiently credible to merit review.

Respectfully submitted,

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Special Attorneys for the State of Minnesota and Counsel for Blue Cross and Blue Shield of Minnesota

April 25, 1996

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF RAMSEY — SECOND JUDICIAL DISTRICT

Case Type: Other Civil

THE STATE OF MINNESOTA,

BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL, — COURT FILE NO. C1-94-8565

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

vs.

PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
B.A.T. INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY,
THE AMERICAN TOBACCO COMPANY,
LIGGETT GROUP, INC.,
THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and
THE TOBACCO INSTITUTE, INC.

Defendants.

CASE MANAGEMENT ORDER

I. GENERAL TERMS OF CASE MANAGEMENT

A. Purpose

The purpose of this Case Management Order is to secure the just, speedy, and inexpensive determination of this action in accordance with Rule 1 of the Minnesota Rules of Civil Procedure. Except as otherwise provided by this Case Management Order or any subsequent order, the Minnesota Rules of Civil Procedure and the General Rules of Practice for the District Courts shall govern this case. This Case Management Order may be modified by the Court *sua sponte* or upon motion of the parties for good cause shown.

B. Substantive Issues of Law

Nothing set forth in this Case Management Order shall be deemed to affect any substantive right, claim, or defense of any party to this matter or constitute any ruling or order on any question of law.

C. Cooperation of Counsel; Non-Waiver of Privilege

Counsel for the respective parties are directed to cooperate to the greatest extent possible to promote the expeditious and efficient handling of these proceedings. Among other things, such cooperation shall include, whenever feasible, the preparation and presentation of joint positions, claims, and defenses by the plaintiffs and

defendants who are aligned on respective sides. To facilitate this cooperation, the exchange or disclosure of information or documents between or among co-counsel for plaintiffs, or between or among co-counsel for defendants, in the course of such joint preparation from August 17, 1994 forward shall not be construed as a waiver of any attorney-client, work-product, or other privilege or any other exemption from any disclosure requirement that may apply to the information or documents so exchanged or disclosed.

A Special Master may be appointed by the Court during the period of discovery.

D. Status Conferences

Except as otherwise ordered or agreed among the parties, general status conferences shall be held on the first Tuesday of every other month, commencing two (2) months following the May 2, 1995 hearing date. The conferences will commence at 9:30 A.M. Any party can request of the Court additional status conferences as needed. Counsel shall use their best efforts to prepare a status conference agenda to be filed five days prior to the conference date.

E. Hearing Dates

Motion hearing dates under Rule 115.02 of the General Rules of Practice for the District Courts shall be obtained directly from the clerk of the presiding judge after consultation with Administrative Liaison Counsel for both plaintiffs and defendants.

F. Administrative Liaison Counsel

The plaintiffs and defendants shall each appoint two Administrative Liaison Counsel. Defendants shall appoint one Minnesota counsel and one national counsel to serve as Administrative Liaison Counsel. The Administrative Liaison Counsel or their designee(s) are vested by this Court with the responsibility:

1. To receive orders, notices, and correspondence from the Court and the District Court Administrator on any matter pertaining to this case, and notify all counsel for whom they serve as Administrative Liaison Counsel of all such orders, notices and correspondence from the Court; and

2. To perform such other duties as may be expressly authorized by further order of this Court or agreed to by counsel for all parties.

G. Pro Hac Vice Admission of Counsel

Attorneys who apply to this Court for pro hac vice admission in this case shall agree to abide by the Minnesota Rules of Professional Conduct and subject themselves to the jurisdiction of this Court for the pendency of this action. See Rule 5, General Rules of Practice for District Courts.

H. Document Preservation

The parties to this action shall be bound by the Amended Order for Preservation of Documents entered in the *Castano* case, a copy of which is attached hereto as Exhibit 1, as well as the following provisions regarding

the preservation of documents. Both the attached *Castano* order and the following additional provisions shall be enforceable in this Court.

1. For these purposes, the phrase " . . . documents containing information that may be relevant to, or may lead to the discovery of information relevant to . . . any claim of the plaintiffs in this case, any defense urged by the defendants in this case . . . " found in paragraph 2(b) of the *Castano* order, shall be deemed to refer to the claims and defenses in the matter of *The State of Minnesota, et al. v. Philip Morris, et al.*

2. To the extent that it is a normal business practice of any party to transfer documents to microfilm, it will not be a violation of this Order to do so and to discard the originals on the express condition that no document is destroyed or doctored before it is fully and accurately transcribed to microfilm.

3. Medical records, x-rays, MRI films, CT scans and other such medical reports and diagnostic films, relating to individual patient care, obtained by the parties to this litigation from third-party health care providers may be discarded pursuant to existing retention policies in effect as of August 1, 1994, unless such documents are obtained for the purposes of this litigation.

4. Except to the extent that outside counsel acts as custodian for documents: (a) once in the possession or control of a party, but no longer in the party's possession or control, or (b) generated in connection with scientific research relating to smoking and health and in connection with outside counsel's participation in selecting or

retaining scientists and/or generating, directing or supervising such scientific research for or on behalf of one or more of the parties, this Order shall not apply to the files of outside counsel.

5. Each party is responsible for complying with this Order (as defined in Exhibit 1 and the Case Management Order) as to documents in that party's actual or constructive care, custody and control; and is also responsible to take appropriate steps to seek the preservation of documents (as defined in Exhibit 1 and the Case Management Order) as to which a party at one time retained and stored in its possession but later decided to transfer its only copy to a corporate affiliate or a third party.

6. In addition to the obligation of the parties to retain documents as set forth in paragraph 2(b) of the *Castano* order, the obligations of Minn. R. Civ. P. Rule 26.05 and Minn. R. Prof. Cond. Rules 3.4 and 8.4 apply and provided further, that the parties will preserve periodic and final reports, final memoranda, patent applications, publications by the parties' scientists, and laboratory notes or notebooks concerning research which may have been conducted at any time after March 29, 1994, and which may hereafter be conducted on (a) smoking and health, including but not limited to epidemiological studies and animal studies; (b) the alleged "addictive" properties of nicotine; and (c) the development of an allegedly "safer cigarette."

I. Service Of Pleadings, Motions, And Briefs

All pleadings, motions, and briefs shall be served by hand-delivery on local counsel no later than 5 p.m. on the

date the pleading, motion, or brief is due. In addition to the required filing of the originals with the clerk, all parties are encouraged to submit proposed findings, memoranda, and orders on 3½ inch computer diskettes formatted for Wordperfect 5.1 for Dos.

II. INCREMENTAL CASE MANAGEMENT

The case shall be managed on an Incremental Case Management basis and proceed according to the following general provisions and schedule:

A. Motions on the Pleadings

All motions on the pleadings under Rule 12 of the Minnesota Rules of Civil Procedure must have been filed with the Court on or before January 26, 1995.

B. Commencement of Discovery

Except as to expert discovery, which is addressed in Section III.F., written discovery on all claims and defenses remaining in the case following the Court's rulings on the Rule 12 motions shall commence thirty (30) days after the Court has ruled on all of the Rule 12 motions. Other than as set forth in the Minnesota Rules of Civil Procedure or by order of this Court, there shall be no limitation as to the subject of discovery.

C. Form of Discovery

The parties shall be free to serve written discovery as soon as the discovery period begins. No depositions shall

be scheduled except by agreement of the parties or by order of the Court. The parties shall meet and confer no later than six months after the commencement of written discovery to exchange proposals regarding the taking of fact depositions in this case, which proposals shall include the timing and scheduling of such depositions and all other issues regarding depositions in this case.

D. Dispositive Motions

Any motions for summary judgment or other motions that parties seek to file after discovery begins shall be filed no later than sixty (60) days after the conclusion of all discovery.

E. Trial

This matter shall be tried to a jury on all of the issues pled in the complaint which are so triable and shall be set for trial during the calendar year 1998. At a time no later than eight (8) months before the conclusion of discovery, the parties shall meet and confer to discuss pretrial matters and propose a pretrial management schedule to the Court, including a schedule for the exchange of witness lists, exhibit lists, the filing of motions in limine and dispositive motions and other such pretrial issues. At that time, the parties will propose a more specific trial date setting in 1998 to the Court for its consideration.

III. INCREMENTAL DISCOVERY MANAGEMENT

A. Joint Discovery

It shall be the general rule in this case that all discovery generic to issues of liability and damages shall be conducted jointly by the plaintiffs as a group and by the defendants as a group, including interrogatories, document requests, requests for admission, and depositions. If a party objects to an opposing party's conducting discovery independent of the other opposing parties, the parties shall meet and confer before applying to the Court for relief.

B. Discovery Relating to the Motion of B.A.T. Industries p.l.c. to Dismiss the Complaint

1. In accordance with the Court's order of December 30, 1994, the Court's decision on the pending motion of B.A.T. Industries p.l.c. to dismiss the Complaint for lack of personal jurisdiction is stayed pending discovery relating to the factual issues necessary to the Court's determination of the motion. All other discovery as against B.A.T. Industries p.l.c. is stayed during the pendency of the motion.

2. The jurisdictional discovery set forth above shall be commenced and completed within 180 days from the date upon which the Court has ruled upon all of the Motions for Judgment on the Pleadings filed in accordance with paragraph 2 of the Court's order of December 30, 1994. Any discovery dispute which results in any delay in this jurisdictional discovery shall automatically toll the 180-day discovery period for an amount of time

equal to the delay in resolving the dispute, absent a ruling of the Court that for good cause shown there shall be no tolling or that tolling shall be limited. Notwithstanding other provisions of this Case Management Order, all time periods as set forth in the Minnesota Rules of Civil Procedure shall apply to this discovery, unless otherwise agreed.

3. Within 30 days (30) days after the expiration of the jurisdictional discovery period, B.A.T. Industries p.l.c. shall file a brief and any supporting papers in further support of its motion. Plaintiffs shall file a responsive brief and any supporting papers within 30 days following service of B.A.T. Industries p.l.c.'s papers. B.A.T. Industries p.l.c. shall file its reply brief and any supporting papers within 15 days following service of plaintiffs' responsive papers. The Court will schedule a hearing on the motion to take place on a date subsequent to the filing of all such papers.

4. Neither paragraphs 2 and 3 of the Court's order of December 30, 1994 nor the provisions of this Case Management Order relating to Motions for Judgment on the Pleadings shall apply to such motions that may be made by or against B.A.T. Industries p.l.c. However, should B.A.T Industries p.l.c. interpose a responsive pleading, plaintiffs and B.A.T. Industries p.l.c. agree to be bound by rulings made on "generic" issues (*i.e.*, legal issues of uniform application regardless of a party's identity or status) presented in the Motions for Judgment on the Pleadings brought pursuant to the Court's order of December 30, 1994, while reserving their rights to seek adjudication of any unique issues presented by their respective pleadings.

C. Interrogatories

1. *Number of Interrogatories:* Plaintiffs shall answer no more than 40 interrogatories; Defendant's shall answer no more than 60 interrogatories, including subparts, with the exception of interrogatories seeking the following information:

(a) the identity of witnesses;

(b) the location, identity and foundation of documents; or

(c) the corporate structure, organization, and interrelationships among the parties and affiliates.

2. *Expansion of Interrogatory Limits:* The limit on interrogatories may be expanded by the Court upon a showing of good cause or by agreement of the party from whom the discovery is sought to be obtained.

3. *Contention Interrogatories:* Contention interrogatories shall not be permitted in this case except by leave of the Court.

D. Document Production.

1. *Technology For Document Production:* The plaintiffs and defendants shall each appoint a technology liaison manager who will work in conjunction with a court appointed technology expert to determine the appropriate technology to be used for the production of documents. Regardless of the technology used, all parties, upon a representation that good cause exists, shall have reasonable access to the original paper copies of such documents so identified. If the producing party objects to

providing such access to the original paper copies, the moving party shall present its showing of good cause to the court, ex parte and in camera.

2. *Protective Order*

The parties shall meet and confer on a Protective Order that shall govern the use of documents produced in this litigation. The Court shall resolve any remaining disputes before any party is obliged to produce documents.

3. *Copies*

Unless a party raises the objection of undue burden in which event the matter shall promptly be submitted to the Court (unless the parties otherwise resolve the issue), all copies of any particular document must be produced, including but not limited to drafts, blind copies, written copies, routing slips, copies of the front of folders and labels on the folders which contain the documents in the files of the parties. However, identical copies of a document which contain no distinguishing marginalia or other distinguishing feature need not be produced.

4. *Document Numbering*

Any party producing documents shall number all produced documents as provided herein. Copies of any produced documents shall be marked by the producing party with an identifying number using a Bates stamp, computerized label, or similar marking system that provides a unique identification number of the document. An explanation of the numbering system – which shall

allow identification of which party produced which documents – shall be provided by the producing party. Documents produced by non-parties shall be numbered with a comparable identification system.

The identifying number assigned to the document shall be used to identify the document for all subsequent pretrial and discovery purposes, provided that once a document has been assigned a deposition exhibit number, it may be cited by such exhibit number.

5. *Document Indexes*

Each party shall produce an index of documents along with the production of its documents, to the extent that each party has an existing index of the documents. To the extent that a party does not have an existing index at the time of production, such index shall be produced at the time it may be created. Such indexes shall include only objective information, such as author, recipient, date, and title of documents and shall not include any subjective information which may be arguably protected by the attorney-client or work product privileges.

6. *Identity of Responsive Request*

Each party shall produce documents to correspond to the appropriate categories in the request for production. If a document is responsive to more than one request, the producing party shall so indicate, unless unduly burdensome to do so.

7. *Privileged Documents* Any document withheld from production based upon a claim of privilege shall be identified in a privilege log which shall include, for each document:

(a) Document production number;

(b) Date;

(c) Author;

(d) Addressees and recipients of copies;

(e) Type of document;

(f) Subject matter of document;

(g) Nature of claimed privilege (e.g. attorney-client; work product).

Such identification of privileged documents shall designate specifically the document request number(s) to which the privileged documents are responsive.

The privilege log shall include all documents withheld from production on grounds of privilege and otherwise responsive to a request for production, including but not limited to documents generated by in-house counsel. The privilege log shall also include documents generated by or in the possession of outside counsel but only to the extent that the request seeks documents over which outside counsel act as custodian which were once in the possession or control of a party but are no longer in the party's possession or control. At such time, however, that plaintiffs request documents generated by or in the possession of outside counsel which relate to research on smoking and health where outside counsel acted as an agent for or on behalf of one or more of the parties, to the extent that such documents are not available from the parties' own files, the parties agree to promptly meet and confer, discuss the scope of the request and seek early resolution of any dispute which might arise as to the

production of such documents or the identification of such documents on the privilege log.

The privilege log need not list attorney-client or work product privileged documents first created on or after August 17, 1994 for this case specifically unless ordered by the Court.

No non-privileged document shall be withheld from production solely on the ground that it is attached or appended to a privileged document.

8. *Redaction of Documents*

There shall be no redaction of documents except on the basis of privilege or pursuant to a Protective Order agreed upon by the parties or ordered by the Court. If redacted, the document must be marked as redacted in the location of the document where it is redacted. Each and every redaction shall be listed in the privilege log unless otherwise agreed to by counsel or ordered by the Court.

9. *Representations Concerning Production of All Documents*

Any document authored by an employee of a party and produced by the party during the course of this litigation is, in the form produced during discovery, genuine, authentic, and a record of regularly-conducted business activities within the hearsay exception set forth in Rule 803(6) of the Minnesota Rules of Evidence, unless the producing party asserts an objection to the foundation of the document within thirty days of the production of the document, or upon application to the Court for good cause shown.

10. *Third-Party Documents*

Any party requesting documents from a third party (not a party to this action) through a subpoena shall insure that all parties in this action are notified of and have access to such documents.

11. *Inadvertent Production of Privileged Material*

A party responding to any request for discovery information shall be responsible to make a reasonable and diligent effort to assert any claims of attorney-client privilege, work-product protection or other recognized privilege when responding to any request for discovery information. However, in the interest of expediting discovery in these proceedings and avoiding unnecessary costs: (a) inadvertent disclosure in this litigation of privileged information shall not constitute a waiver of any otherwise valid claim of privilege; and (b) failure to assert a privilege in this litigation as to one document or communication shall not be deemed to constitute a waiver of the privilege as to any other document or communication allegedly so protected, even involving the same subject matter. Unless there is a disagreement among the parties as to the existence of a privilege, such inadvertently produced documents shall be promptly returned to the producing party, together with all copies thereof. Nothing in this paragraph shall preclude any party from challenging a claim of privilege as to any document on any basis other than an inadvertent waiver of privilege.

12. *Minnesota Government Data Practices Act, Minn. Stat. § 13.01 et. seq.*

Defendants are not prohibited from obtaining information under the Minnesota Data Practices Act. Defendants shall notify plaintiffs after obtaining such information and provide plaintiffs a listing of documents obtained under the Act.

13. *Scheduling of Responses to Document Requests Other Than Discovery Relating to the Motion of B.A.T. Industries P.L.C. to dismiss the Complaint*

It is agreed in principle that certain categories of priority documents can be identified for an early production.

With respect to the remaining production of documents, the parties will meet and confer within two weeks after the service of a request for production of documents to discuss, for documents for which there is no objection to production, an estimate of the volume of documents which would be responsive and the timing of production. Within forty-five (45) days of service of any document request, the party from whom production is requested shall file and serve all written objections, including the basis for the objections, to the document request. Within this time frame, the parties shall also meet and confer and formulate a response plan. The response plan shall, at a minimum, address the following issues: (i) an estimate of the number of documents which will be produced, (ii) the logistics for production of the documents; (iii) a proposed place of production; (iv) the manner of numbering of the documents to be produced; and (v) dates for the production of documents and submission of an appropriate privilege log (as described herein in ¶ III.D.7).

E. Requests For Admissions

There shall be no limitation on the number of requests for admissions served in this case; provided, however, that nothing herein shall preclude a party from moving for an appropriate protective order.

F. Expert Discovery

The Court shall determine by subsequent order all matters pertaining to expert discovery. The parties shall meet and confer no later than December 1, 1995, to exchange proposals regarding expert discovery, which proposals shall include the manner and scope of expert discovery and the timing and sequence of expert discovery. A hearing before the Court shall be scheduled in early 1996 to resolve any differences between the parties regarding expert discovery.

Dated: March 29, 1995.

/s/ Kenneth J. Fitzpatrick
The Honorable Kenneth J. Fitzpatrick
Judge of District Court

EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

DIANNE CASTANO, et al.,	*	CIVIL ACTION
Plaintiffs,	*	NO. 94-1044
VERSUS	*	SECTION "B"
THE AMERICAN TOBACCO CO., et al.,	*	MAGISTRATE 5
Defendants.	*	

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AMENDED ORDER FOR PRESERVATION OF RECORDS

The Order for Preservation of Records, entered April 18, 1994, is hereby AMEMDED [sic] to read as follows:

1. PRESERVATION. During the pendency of this litigation, and until a final order is entered by the Court closing this case, each of the parties herein and their respective officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise are restrained and enjoined from altering, interlining, destroying, permitting the destruction of, or in any other fashion changing any "document" in the actual or constructive care, custody, or control of such person, wherever such document is physically located. Such persons are also enjoined from changing the location of any such documents to a location outside of the jurisdiction of the United States.

2. SCOPE.

(a) "Document" shall mean any writing, drawing, film, videotape, chart, photograph, phonograph record, tape record, mechanical or electronic sound recording or transcript thereof, retrievable data (whether carded, taped, coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained, including (but not limited to) notices, memoranda, diaries, minutes, purchase records, purchase invoices, market data, correspondence, computer storage tapes, computer storage cards or discs, books, journals, ledgers, statements, reports, invoices, bills, vouchers, worksheets, jottings, notes, letters, abstracts, audits, charts, checks, diagrams, drafts, recordings, instructions, lists, logs, orders, recitals, telegram messages, telephone bills and logs, resumes, summaries, compilations, computations and other formal and informal writings or tangible preservations of information.

(b) This Order pertains only to documents containing information that may be relevant to, or may lead to the discovery of information relevant to, (1) manufacturing methodology, testing, and/or composition and properties of tobacco, tobacco products, paper, filters, or any other materials contained in, relating to, or used in the manufacturing, testing, and/or composition and properties of tobacco and tobacco products; and (2) any claim of the plaintiffs in this case, any defense urged by the defendants in this case, and/or plaintiffs' request for class certification in this case. This order pertains only to documents which were written or generated from January 1, 1946 until March 29, 1994. Any document described or

referred to in any discovery request made during this litigation and which otherwise is encompassed by this subparagraph (b) shall, from the time of the request, be treated for purposes of this order as containing such information unless and until the Court rules such information to be irrelevant. Nothing contained herein shall prevent a party from seeking to modify, expand, or restrict the scope of the documents described in this Paragraph 2(b) by consultation and agreement with opposing counsel or by application to the Court; and all parties reserve all of their rights in connection with any such requests.

(c) Counsel are directed to confer to resolve questions as to what documents are outside the scope of this Order or otherwise need not be preserved and as to an earlier date for permissible destruction of particular categories of documents. If counsel are unable to agree, any party may apply to the Court for clarification or relief from this Order upon reasonable notice. A party which, within 30 days after receiving written notice from another party that specified documents will be destroyed, lost, or otherwise altered pursuant to routine policies and programs, fails to indicate in writing its objection shall be deemed to have agreed to such destruction.

3. **IMPLEMENTATION.** Each party will, within 10 days after receiving this Order, designate an individual who shall be responsible for ensuring that the party carries out the requirements of this Order.

4. **AGREEMENT OF COUNSEL.** Without leave of Court, Liaison Counsel for plaintiffs and for defendants may agree in writing, at any time and from time to time,

that certain documents or categories of documents need not preserved in accordance with this Order. If any such agreement is reached, those documents or categories of documents automatically and without further order of the Court shall no longer be encompassed by or subject to this Order.

New Orleans, Louisiana, this 5th day of July, 1994.

/s/ _____
Judge, United States
District Court

AGREED TO:

/s/ Peter J. Butler
Peter J. Butler
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RAIN HARRELL
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Liaison Counsel for
Defendants

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
FILE # C1-94-8565

The State of Minnesota
By Hubert H. Humphrey, III,
Its Attorney General, and
Blue Cross and Blue Shield
of Minnesota,

Plaintiffs,

vs.

Philip Morris Incorporated,
R.J. Reynolds Tobacco Company,
Brown and Williamson Tobacco
Corporation, B.A.T. Industries,
P.L.C., Lorillard Tobacco
Company, The American Tobacco
Company, Liggett Group, Inc.,
The Council For Tobacco
Research – U.S.A., Inc.,
and The Tobacco Institute,

Defendants.

ORDER

(Filed
July 17, 1995)

The above matter came on for a regularly scheduled general status conference before the Honorable Kenneth J. Fitzpatrick on July 11, 1995, pursuant to the Case Management Order dated March 29, 1995. Michael V. Ciresi, Esq., appeared and argued on behalf of Plaintiffs. Allen M. Katz, Esq., appeared and argued on behalf of Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown and Williamson Tobacco Corporation,

Lorillard Tobacco Company, The American Tobacco Company, Liggett Group, Inc., The Council For Tobacco Research – U.S.A., Inc., and The Tobacco Institute. Additional counsel also appeared, but did not argue, on behalf of the parties.

Based on the file, arguments, and representations of counsel

IT IS HEREBY ORDERED:

1. Pursuant to agreement of Plaintiffs and B.A.T. Industries, p.l.c., the time limits for jurisdictional discovery relating to the Motion of B.A.T. Industries, p.l.c., to Dismiss shall be tolled beginning June 21, 1995.

2. Special Master. Plaintiffs' request for a Special Master is DENIED at this time. The court cautions the parties, however, that it may at any time, on its own motion, decide to appoint a Referee pursuant to Minn. R. Civ. P. 53, particularly if despite the court's admonishment the parties persist in bringing matters of a minute nature before the court.

3. Document Depositories.

A. One depository located within thirty (30) miles of the Minneapolis/St. Paul International Airport shall be established for timely and efficient control and management of discovery in this action. All documents produced by any party to this action shall be deposited therein. Within thirty (30) days of this order, the parties shall inform the court of their chosen site, along with mutually agreed upon vendors

of security, maintenance, copying, imaging, and administrative/staff support.

B. The depository shall be open for inspection of documents from 8 a.m. to 8 p.m., Monday through Friday, at the request of any party on written notice of five business days, unless the parties agree or the Court orders expanded or reduced hours. Each person entering the warehouse shall be required to identify himself or herself, by law firm and party represented, and sign in on a registration log.

C. All parties with access to the depository shall be allowed to view the entire depository at any time during which the depository is open and to select any box or group of boxes for immediate review. The depository staff mutually selected by the parties or appointed by the Court shall have the sole authority to physically remove the requested boxes from the depository shelves for viewing by an authorized party and to replace the requested boxes back on the depository shelves after viewing by the authorized party.

D. The cost of placing documents requested for production into the depository shall be borne by the party producing the documents. The administrative costs and expenses of operating the depository shall be allocated among the parties on a pro-rata basis determined by use of the facility.

E. The cost of copying or imaging selected documents from the depository shall be borne by the party requesting the copying or imaging of the selected documents. The party selecting the documents shall choose the method of copying or imaging. The copying or imaging shall be

performed by the vendor(s) selected by the parties or appointed by the court. All documents duplicated or imaged for the requesting party shall be copied or imaged off of the actual documents in the depository and not from documents maintained at a different location, absent agreement of the parties or order of the Court.

F. Regardless of the manner of copying or imaging, the producing party shall be entitled to receive a record of which documents have been copied or imaged by the requesting party, or a duplicate set of the copies shall be provided to the producing party upon its request and at its expense.

G. Regardless of the manner of copying or imaging, a requesting party shall have the right to designate a reasonable number of documents each day for immediate copying and delivery. At the election of the producing party, this may be accomplished either by providing a convenience copier in the depository for use by the requesting party, or if copying is to be performed off-site, by making appropriate arrangements for the delivery of the requested documents by air courier or hand delivery within one business day.

H. All documents in the depository shall be Bates numbered in accordance with the Case Management Order and shall be placed in numbered boxes. Each box shall be labeled with a box number and the beginning and ending of Bates numbers of documents contained therein, with the labels clearly visible for viewing by walk-by inspection. In addition, the party operating the depository shall maintain a list in each box of each and every document contained

within each box, as well as a master list maintained in the depository and distributed to all other parities [sic] of each and every document in each box. Such lists shall be updated as necessary.

I. The producing party shall notify all other parties in writing within 48 hours of the placement of documents in the depository. The identification of documents in such notice shall include the Bates numbers of the documents, the box numbers, and the document requests to which the documents are responsive (in accordance with the Case Management Order).

J. The staff operating the depository shall maintain a written guide to the location of documents in the depository, for example, a guide to the location of documents by box and Bates numbers.

K. The staff operating the depository shall maintain at the depository copies of all privilege logs and written document responses from a party in this litigation.

L. Once placed in the depository, documents shall not be removed from the depository, renumbered, reboxed, or moved to a different location of the depository, absent agreement of the parties or order of the Court; provided, however, that:

(I) Documents may be removed from the depository for the purpose of making copies or images as requested by the reviewing party;

(ii) Documents may be reboxed or moved to a different location of the depository in order to keep documents in sequential Bates-numbered order as new documents are placed in the depository; however, any reboxing or moving done pursuant to this subparagraph shall be accompanied by immediate (48 hours) and explicit notice to all other parties of new Bates numbers, new box numbers, and new locations. Where it is more convenient to do so, in lieu of reboxing to keep documents in sequential order, a party may place later-produced documents in a box supplemental to the original box. For example, if box 1 has a Bates-number range of 100 to 500 and later produced documents belong in that box, these documents may be placed in box 1A and placed next to box 1.

M. The depository shall have at least one telephone and one dedicated line for computers.

N. Computer versions of documents shall not be transmitted from the depository itself. The receiving party shall have the right, for any depository document for which it has received a copy pursuant to this order, to transmit the document via computer from any other location to any person authorized to receive the document.

O. The depository shall be reasonably heated and air conditioned and have restroom facilities on site.

P. The depository shall be equipped with tables and chairs to serve as a work space for persons reviewing documents. This work space shall be contiguous with (under the same roof as) the storage area for documents.

4. Document Indexes.

A. Existing Indexes: To the extent that any party has previously prepared or produced any index of documents relative to the subject matter of this action, said party shall immediately produce such existing index to the opposing party; provided, however, that if the producing party claims an existing index contains subjective information protected by the attorney-client or work product privileges, it shall submit such index to the court for *in camera* inspection and determination.

B. Indexing Upon Production. All parties shall, in conformance with the Case Management Order and this order, provide an index to the documents produced in discovery. Said index shall be provided along with the documents produced. Each such index shall contain at least the following standard information with respect to each document produced:

(I) Author(s) of document;

(ii) Recipient(s) of document, including those receiving copies;

(iii) Date of document;

(iv) Type of document (e.g., memo, letter, news release, pamphlet, etc.);

(v) Title of document (e.g., title, subject, or "re" line, etc.); and

(vi) Bates identification number.

5. Computer-Assisted Litigation Management Technology. The parties shall within ten (10) days of this order inform the court of their progress with respect to

choice of computer-assisted litigation management technology, such as CLAD. Absent the parties' agreement, the court shall determine this matter for efficient management of this action.

DATED: July 14, 1995

/s/ Kenneth J. Fitzpatrick
Kenneth J. Fitzpatrick
CHIEF JUDGE

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

The State of Minnesota By Hubert Humphrey, III, Its Attorney General, and Blue Cross and Blue Shield of Minnesota,

Plaintiffs,

vs.

Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown and Williamson Tobacco Corporation, B.A.T. Industries, P.L.C., Lorillard Tobacco Company, The American Tobacco Company, Liggett Group, Inc., The Council For Tobacco Research – U.S.A., Inc., and The Tobacco Institute,

Defendants.

FILED #C1-94-8565

ORDER

(Filed Aug. 10, 1995)

WHEREAS, the parties acknowledge that certain indices (also called "databases") exist which identify documents relative to the above-captioned matter;

WHEREAS, Plaintiffs have provided the Court a copy of what they purport to be their complete existing indices, both in paper and in ASCII form on 3.5 inch computer disk, requesting in camera review and seeking

the court's order protecting specifically identified material from disclosure to Defendants;

WHEREAS, Defendants have requested an ex parte hearing with respect to disclosure of their existing indices, seeking the court's order protecting currently unidentified information from disclosure to Plaintiffs;

WHEREAS, the parties have not provided copies of any existing indices to opposing counsel;

IT IS HEREBY ORDERED:

1. If not already provided, each party shall submit a copy of all existing indices to the Court for *in camera* review. Such indices shall be in the form of ASCII or WordPerfect 5.0/5.1 documents on 3.5 inch disk and, unless too voluminous, in the form of "hardcopy" or "paper" as well.

2. If not previously identified, each party shall identify the specific information it seeks to protect from disclosure for *in camera* review.

3. Each party shall file and serve a legal memorandum specifically identifying the nature of the information it seeks to protect from disclosure and legal argument and authorities supporting that argument. General discourses on the work product or attorney/client privilege theories, without reference to specific information, are discouraged. Each such memorandum shall be limited to twenty (20) pages and must be filed and served no later than five (5) days from the date of this Order.

4. Each party may file and serve a response in opposition to the other parties' memorandum; however,

such response shall be limited to ten (10) pages and must be filed and served no later than three (3) days from the date of service of the other parties' memorandum.

DATED: August 10, 1995

/s/ Kenneth J. Fitzpatrick
Kenneth J. Fitzpatrick
CHIEF JUDGE

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

FILED #C1-94-8565

The State of Minnesota By Hubert Humphrey, III, Its Attorney General, and Blue Cross and Blue Shield of Minnesota,

Plaintiffs,

vs.

Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown and Williamson Tobacco Corporation, B.A.T. Industries, P.L.C., Lorillard Tobacco Company, The American Tobacco Company, Liggett Group, Inc., The Council For Tobacco Research – U.S.A., Inc., and The Tobacco Institute,

Defendants.

ORDER

(Filed Aug. 17, 1995)

This matter came before the Court upon the motion of Defendants R.J. Reynolds Tobacco Company, Philip Morris Incorporated, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, The American Tobacco Company, Liggett Group, Inc., and The Tobacco Institute, Inc. to modify the Court's August 10, 1995 Order.

WHEREAS, the matter of the production of existing indices, whether called "indexes," "databases," or some other related term, has come before this Court numerous times; and

WHEREAS, this Court has addressed the production of existing indices and databases in its Orders dated March 29, 1995, July 17, 1995, and August 10, 1995;

NOW, THEREFORE, based upon all of the memoranda, affidavits, and materials on file with the Court, as well as previous arguments related to discovery in this action

IT IS HEREBY ORDERED:

1. Defendants R.J. Reynolds Tobacco Company, Philip Morris Incorporated, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, and The American Tobacco Company are not required to produce full copies of all existing indices to the Court for *in camera* review at this time but instead may comply with the Court's August 10, 1995, Order by furnishing one or more exemplar discs of each and every existing litigation index and database *no later than ten days from the date of this Order.*

2. Each exemplar disc shall contain a random and representative sample of at least one thousand records of each such index or database. Each field, classification, grouping, and category of information in each existing index or database shall be listed and represented by a minimum of two hundred records. Defendants named in paragraph 1 above shall submit with each exemplar disc

an explanation, under oath, about which portions of each index or database were reproduced and how they were selected, as well as attesting to compliance with the terms of this Order and the August 10, 1995, Order as modified herein.

3. A "hard copy" or "paper" printout of the contents of each such exemplar disc shall be produced, with the information sought to be protected specifically identified.

4. Except as expressly stated herein, the Court's Order of August 10, 1995, remains in full force and effect.

5. Nothing in this Order shall limit or restrict the parties' opportunities to depose each person who submitted affidavits in support of Defendants' Motion to Modify the August 10, 1995, Order and each person who shall submit affidavits required in paragraph 2 above.

6. The Court's Order of August 10, 1995, remains in full force and effect in its entirety with respect to the Plaintiffs, B.A.T. Industries, P.L.C., Liggett Group, Inc., The Tobacco Institute, Inc., and The Council for Tobacco Research – U.S.A., Inc. Plaintiffs, B.A.T. Industries, P.L.C., and The Council for Tobacco Research – U.S.A., Inc., sought no modification of the August 10, 1995, Order. Liggett Group, Inc., and The Tobacco Institute, Inc., although joining in the motion for modification, have made no showing that full compliance with the Order would be unduly burdensome or expensive.

DATED: August 16, 1995

/s/ Kenneth J. Fitzpatrick
Kenneth J. Fitzpatrick
CHIEF JUDGE